Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

No. 97-150

In The

Supreme Court of the United States

October Term, 1996

JOSE GRACIA, ET AL.,

Petitioners,

v.

RAUL TREVINO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROGER WADE HUGHES*
CRAIG H. VITTITOE
GEORGINA MARTINEZ BENAVIDES
ADAMS & GRAHAM, L.L.P.
P.O. Drawer 1429
Harlingen, TX 78551-1429
956/428-7495; Fax: 956/428-2954
Counsel for Respondents
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

QUESTIONS PRESENTED

1. Does 24 C.F.R. § 966.4 create a right in favor of social guests of public housing tenants that the premises be kept safe, which right is enforceable under 42 U.S.C. § 1983?

2. Does the question of whether the District Court correctly defined and submitted the state tort claim against Brownsville Housing Authority present a question that this Court should review?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

FACTUAL BACKGROUND 1

A. Procedural History 1

B. Factual Background 2

1. The Evidence Supported the Jury's Finding That BHA Had No Actual Knowledge The Tree Posed A Hazard 2

a. Residents and Visitors Saw No Hazard 2

b. Plaintiffs' Expert Testified It Takes Expertise to Recognize Hazard 3

c. Prior Inspections Failed to Show Tree About to Fall 3

2. There Was No Evidence That A Final Policymaker Deliberately Approved a Custom That Violated Any Federal Right 4

REASONS FOR DENYING THE WRIT 5

A. Unnecessary to Review Substantially Correct Ruling on State Law Torts 6

B. HUD Regulations Do Not Create A Right Secured By the Laws of the United States Enforceable Under 42 U.S.C. § 1983 8

C. Social Guests at Public Housing Premises are not Within the Class of Persons Protected by Alleged "Rights" 11

TABLE OF CONTENTS – Continued

Page

D. Petitioners Failed to Prove a Violation of Regulations 13

E. Petitioners Failed to Show that Their Injury Resulted From a Custom Deliberately Tolerated by Final Policymaker for Housing Authority.... 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Board of County Commissioners of Bryan County v. Brown, ___ U.S. ___, 117 S.Ct. 1382 (1997) 14, 16

Byrd v. Blue Ridge Rural Electrical Co-operative, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958) 7

City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) 14

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) 6

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961) 6

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) 7, 12

Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76 (Tex. 1997) 7

Edwards v. District of Columbia, 628 F.Supp. 333 (D.D.C. 1985) *aff'd* 821 F.2d 651 (D.C.Cir. 1987) ...11, 13

Ellison v. Cocke County, 63 F.3d 467 (6th Cir. 1995) 9

Father Panik Village v. Pierce, 685 F.Supp. 316 (D.Conn. 1988) 11, 13

Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) 7

Gracia v. Brownsville Housing Authority, 105 F.3d 1053 (5th Cir. 1997, writ pndng.) 1

Hale v. Chicago Housing Authority, 642 F.Supp. 1107 (N.D.Ill. 1986) 11

TABLE OF AUTHORITIES – Continued

Page

Huckabay v. Irving Hosp. Auth., 879 S.W.2d 64 (Tex.App. – Dallas 1993, writ dism'd by agr.) 7

Jett v. Dallas ISD, 7 F.3d 1241 (5th Cir. 1993) *cert. den.* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1993) 15

Louis v. Praprotnik, 485 U.S. 112, 130 S.Ct. 915, 99 L.Ed.2d 107 (1988) 15

Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) 8

Maynard v. Williams, 72 F.3d 848 (11th Cir. 1996) 9

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 63 L.Ed.2d 611 (1978) 14

Mungiovi v. Chicago Housing Auth., 98 F.3d 982 (7th Cir. 1996) 10

Perry v. Housing Authority of the City of Charleston, 664 F.2d 1210 (4th Cir. 1981) 11

Resident Council of Allen Parkway Village v. United States Department of Housing & Urban Development, 980 F.2d 1043 (5th Cir. 1993) *cert. den.* ___ U.S. ___, 114 S.Ct. 75, 126 L.Ed.2d 43 (1993) 9

San Antonio Housing Auth. v. Underwood, 782 S.W.2d 25 (Tex.App. – San Antonio 1989, no writ) 7

Smith v. Kirk, 821 F.2d 980 (4th Cir. 1987) 10

State Department of Highways v. Payne, 838 S.W.2d 235 (Tex. 1992) 7

Stowell v. Ives, 976 F.2d 65 (1st Cir. 1992) 9

Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) 8, 9

TABLE OF AUTHORITIES – Continued

Page

Thompson v. Binghamton Housing Authority, 546 F.Supp. 1158 (N.D.N.Y. 1982) 11, 12

United States v. Durham Lumber Co., 363 U.S. 522, 80 S.Ct. 1282, 4 L.Ed.2d 1371 (1960) 7

Wei v. Robinson, 246 F.2d 739 (7th Cir. 1957) *cert. den.* 355 U.S. 879, 78 S.Ct. 144, 2 L.Ed.2d 109 (1957) 10

Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987) .. 9, 10

STATUTES:

42 U.S.C. § 1437, *et seq* 11

42 U.S.C. § 1437a 9

42 U.S.C. § 1437c(a) 11

42 U.S.C. § 1437d(l) 11

42 U.S.C. § 1437l 4

42 U.S.C. § 1983 ..... *passim*

CODE OF FEDERAL REGULATIONS:

24 C.F.R. § 966.4 11

24 C.F.R. § 966.4(d) 11, 12

24 C.F.R. § 966.4(e) 8, 13

24 C.F.R. § 966.6(c) 8, 13

24 C.F.R. § 968.115(b) 8

54 Fed. Reg. 52686 (December 21, 1989) 8

TABLE OF AUTHORITIES – Continued

Page

TEXAS CIVIL PRACTICE & REMEDIES CODE:

Chap. 101 6

§ 101.001(2)(D) 7

§ 101.022(a) 6

TEXAS LOCAL GOVERNMENT CODE:

Article 1296(k), VATCS [repealed, now Chap. 392, Tex.Loc.Gov.Code] 15

§ 392.036 15

§ 392.038 15

§ 392.051(b) 15

FACTUAL BACKGROUND

A. Procedural History

While Jose and Monica Gracia played on a hammock strung between two trees at their great-grandfather's apartment, one tree collapsed on them. Petitioners sued the Brownsville Housing Authority ("BHA"), Mr. Trevino (its Executive Director) and Mr. Rubalcaba (its Maintenance Superintendent) in state court for state law torts. When the Gracias added a claim under 42 U.S.C. § 1983, Defendants removed to Federal Court.

At trial, the District Court granted only Mr. Trevino and Mr. Rubalcaba a directed verdict. In response to Question No. 1 (which submitted Plaintiffs' state tort claim), the jury failed to find Defendants knew of any danger the tree posed. PA K.[1] The Gracias did not challenge this finding on appeal.

Because the Court's charge conditioned the remaining questions on § 1983 liability on a "yes" answer to Question No. 1, the jury did not answer them. A take-nothing judgment resulted.

The Fifth Circuit affirmed. *Gracia v. Brownsville Housing Authority*, 105 F.3d 1053 (5th Cir. 1997, writ pndng.). It held that Question No. 1 correctly submitted BHA's duty under Texas tort law. 105 F.3d at 1056. It further held that the Gracias failed to prove the elements of a § 1983 claim against Defendants. *Id.* at 1058.

---

[1] References to Petitioners' Appendix will be made as "PA ___."

B. Factual Background

The accident occurred during a family gathering at Esequiel Gracia's apartment. Jose and Maria Gracia and their children were social guests at his apartment. Jose Gracia was not a tenant at BHA, nor was he a low-income person desiring public housing.

Four children were in a hammock strung between an ebony tree and an avocado tree planted by Esequiel Gracia's mother in the 1950s. While they were swinging, the avocado tree suddenly fell over.

1. The Evidence Supported the Jury's Finding That BHA Had No Actual Knowledge The Tree Posed A Hazard

At trial, the critical question was whether the rotting inside the base of the tree was obvious. The annual inspection issue was a "red herring" because all witnesses agreed a BHA maintenance worker inspected and trimmed the tree shortly before the accident. Plaintiffs' problem throughout trial was that: (1) neither Esequiel Gracia nor any of the guests saw anything that made them think the tree was dangerous; (2) Mr. Stayton, Plaintiffs' own expert, admitted that one would have to have expert training, background, and tools to detect the rotted condition; and (3) prior inspections of the tree did not show that it posed a hazard.

a. Residents and Visitors Saw No Hazard

Esequiel Gracia had used the tree for decades to secure his hammock. Esequiel Gracia and the Gracias' all

testified the tree trunk appeared quite hard and sturdy; it had no visual signs that it would give way or collapse. The tree itself was over 40 feet tall. Its roots had sprouted several tall saplings that surrounded the tree.

b. Plaintiffs' Expert Testified It Takes Expertise to Recognize Hazard

Mr. Stayton, Plaintiffs' expert, testified that the tree collapsed because, after a freeze in 1983, it developed a rot inside of the trunk at the ground line. The rot produces a "punky" material inside the trunk's base. The decay will not be visible from the outside. Above the ground line, the trunk actually becomes much harder than living wood. The trunk's exterior will appear sound and hard.

Mr. Stayton agreed that only a person with specialized training or extensive experience in removing dead trees would know about the hazard from the interior rot. A lay person's understanding does not equate to the knowledge or experience of experts. He conceded that ordinary people would need special tools to detect the rot inside the trunk.

c. Prior Inspections Failed to Show Tree About to Fall

It was uncontroverted that BHA's employee trimmed the dead branches from the tree three months before the accident. Esequiel Gracia called Mr. Rubalcaba's office about three months before the accident to ask to have some dead branches trimmed.

A maintenance worker came to Gracia's apartment and removed several branches by tying a rope to them and pulling them off with his truck. Even after using the truck to pull off the branches, the worker believed the avocado tree still appeared sturdy and alive.

Mr. Rubalcaba did not believe the tree had died. When he saw it before the accident, it was surrounded by living saplings growing from its roots and appeared to have its own green leaves. Three other maintenance workers who had trimmed the tree during the three years before the accident thought the tree was still alive and sturdy.

2. There Was No Evidence That A Final Policymaker Deliberately Approved a Custom That Violated Any Federal Right

No statute or HUD regulation required Defendants maintain Esequiel Gracia's apartment or inspect it annually. BHA's Maintenance Plan (PA F) was a self-imposed policy adopted in response to a HUD suggestion. There was no evidence Defendants adopted or approved any custom of not inspecting apartments or trees.

In 1983, BHA adopted its Maintenance Plan in response to a *suggestion* by HUD's regional manager. The regional HUD office approved the Plan as part of fulfilling BHA's 1983 CIAP budget proposal to obtain modernization funds.[2] PA H. BHA's Plan did require annual

---

[2] BHA had applied for funds to modernize under the Comprehensive Improvement Assistance Program, 42 U.S.C. § 1437l.

inspection of apartments, but did not require Mr. Trevino or Mr. Rubalcaba to personally inspect them.

Mr. Trevino felt BHA had complied with its maintenance plan after 1985. HUD commended him for the maintenance program. HUD made no complaints after 1985 that BHA failed to follow its maintenance plan.

Mr. Trevino delegated the actual inspection of the apartments to the project managers, as HUD recommended. Neither he nor Mr. Rubalcaba personally inspected any of the premises. There was no evidence of any widespread practice to not maintain apartments or not remove dead trees. They denied that there was a custom or practice of not doing maintenance or annual inspections.

The Gracia Petition, pp. 4-5, erroneously argues Mr. Trevino admitted proper inspections would have shown the tree was dead. He stated only inspections *could* have determined whether it was dead. If he had seen the tree before the accident, he would have had to consult an expert to know whether it was a hazard.

REASONS FOR DENYING THE WRIT

The Petitioners' claim that the courts below misconstrued BHA's duty under Texas tort law does not merit review by this Court. Their claim that HUD regulations gave social guests a right to safe premises enforceable under 42 U.S.C. § 1983 does not merit review by this

Court. The Fifth Circuit decision that the Gracias failed to make a *prima facie* case rests on settled law, and no conflict in the circuit is even alleged.[3]

A. Unnecessary to Review Substantially Correct Ruling on State Law Torts

The Petition, p. 7, erroneously claims the Fifth Circuit held the Texas Tort Claims Act (Chap. 101, Tx. Civ. Prac. & Rem. Code) gave BHA sovereign immunity against federal and state claims. This claim is a "red herring" for the Fifth Circuit never held sovereign immunity barred the Gracias' § 1983 or common law tort claims. This mischaracterization of the lower court's ruling is a thinly disguised attempt to attack its determination of BHA's tort duty under Texas law.

The Petition's statutory interpretation arguments, pp. 10-15, simply bear on whether question 1 in the court's charge correctly submitted the state law tort duty. If BHA was a "governmental unit," then the Texas Tort Claims Act, Chap. 101, Tx. Civ. Prac. & Rem. Code, applied. Section 101.022(a), Tx. Civ. Prac. & Rem. Code, defined BHA's duty for tort claims from defective premises to require proof that BHA had actual notice of the alleged

---

[3] The Gracia Petition asserts no question challenging the directed verdict for Mr. Trevino and Mr. Rubalcaba in their individual capacities. Therefore, this Court should treat as abandoned any questions concerning their personal liability. *Coleman v. Thompson*, 501 U.S. 722, 744, 111 S.Ct. 2546, 2561, 115 L.Ed.2d 640 (1991); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 32, 81 S.Ct. 1357, 1377, 6 L.Ed.2d 625 (1961)

defect. *State Department of Highways v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

Ordinarily, this Court accepts the interpretation of state law made by the court of appeals. *Byrd v. Blue Ridge Rural Electrical Co-operative*, 356 U.S. 525, 529, 78 S.Ct. 893, 897, 2 L.Ed.2d 953 (1958). This Court is hesitant to overrule courts of appeals that are skilled in determining local law, unless their conclusion is clearly unreasonable. *United States v. Durham Lumber Co.*, 363 U.S. 522, 527, 80 S.Ct. 1282, 1285, 4 L.Ed.2d 1371 (1960). This Court defers to the court of appeals' interpretation of state law in order to render review of such determinations unnecessary; this rests on the sound belief that lower courts are better schooled and able to interpret the laws of their own states. *See Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988); *Cort v. Ash*, 422 U.S. 66, 73, 95 S.Ct. 2080, 2085, 45 L.Ed.2d 26 (1975).

The Fifth Circuit's interpretation of Texas law is correct. It properly concluded that BHA was a "governmental unit" as defined by § 101.001(2)(D), Tx. Civ. Prac. & Rem. Code. 105 F.3d at 1056. Providing public housing is a government function which properly put public housing authorities under the Texas Tort Claims Act. *San Antonio Housing Auth. v. Underwood*, 782 S.W.2d 25, 28 (Tex.App. – San Antonio 1989, no writ). Public authorities created by cities are generally treated as subject to the Texas Tort Claims Act. *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 82 (Tex. 1997); *Huckabay v. Irving Hosp. Auth.*, 879 S.W.2d 64, 66 (Tex.App. – Dallas 1993, writ dism'd by agr.).

B. HUD Regulations Do Not Create A Right Secured By the Laws of the United States Enforceable Under 42 U.S.C. § 1983

The Gracias have limited their § 1983 claim to violations of "rights" created by specific HUD regulations: 24 C.F.R. §§ 944.4(e) and 966.6(c).[4] They make no claim that BHA deprived them of a constitutional right or violated the terms of a federal statute. The HUD regulations do not create a right secured by the laws of the United States.

In pertinent part, § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities, secured by the Constitution *and laws* shall be liable to the party injured . . . " (Emphasis added)

In *Maine v. Thiboutot*, 448 U.S. 1, 6, 100 S.Ct. 2502, 2505, 65 L.Ed.2d 555 (1980), this Court recognized that § 1983 granted a cause of action to redress violations of federal statutes. However, if the federal statute does not create an enforceable "right" within the meaning of § 1983, no cause of action exists. *Suter v. Artist M.*, 503 U.S. 347, 355, 112 S.Ct. 1360, 1366, 118 L.Ed.2d 1 (1992).

---

[4] The Petition also refers to duties created by 24 C.F.R. § 968.115(b). However, § 968.115 was not adopted by HUD until two years after the accident. 54 Fed. Reg. 52686 (December 21, 1989).

In *Suter*, this Court noted that § 1983 does not make actionable mere violations of federal law. 503 U.S. at 357, 112 S.Ct. at 1367. Rather, the court must look to the entire statute, its history and purpose, to see if Congress intended to create private, enforceable rights. *Id.* If Congress intended to impose as a condition upon federal grants that a federal right be created for recipients against the state, such a condition must be unambiguous. 503 U.S. at 356, 112 S.Ct. at 1366. The statute must clearly notify the state that the receipt of federal monies exposes the state to liability to recipients. 503 U.S. at 362, 112 S.Ct. at 1369.

The lower courts have consistently recognized *Suter* required proof that Congress, in exercising its spending power, unambiguously conferred an enforceable right upon statutory beneficiaries. *See, e.g., Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992); *Resident Council of Allen Parkway Village v. United States Department of Housing & Urban Development*, 980 F.2d 1043, 1052 (5th Cir. 1993) *cert. den.*, ___ U.S. ___, 114 S.Ct. 75, 126 L.Ed.2d 43 (1993); *Maynard v. Williams*, 72 F.3d 848, 852 (11th Cir. 1996); *Ellison v. Cocke County*, 63 F.3d 467, 472 (6th Cir. 1995).

The Gracias' Petition, p. 17, suggests this Court has held that HUD regulations which specify lease terms may constitute a "law" enforceable through § 1983, citing *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987); (O'Connor, J., dissenting). In *Wright*, low income tenants brought suit to enjoin the enforcement of HUD regulations that set the amount of utility charges that could be charged under 42 U.S.C. § 1437a. This Court and the lower courts agreed that 42 U.S.C. § 1437a intended to vest the tenants with

specific rights. 479 U.S. 424, 429, 107 S.Ct. at 770, 773. The question was whether Congress' statutory scheme foreclosed private enforcement for violations of § 1437a. *Id.* Therefore, the majority opinion relied upon the intent of a different statute rather than a regulation.

Justice O'Connor's dissent questioned whether regulations alone could create a "right" enforceable under § 1983. 479 U.S. at 437, 107 S.Ct. at 777. Her dissent pointed out the parties had not briefed the question of whether regulations can create such a right. *Id.* Her dissent further pointed out the serious policy questions that could arise if an administrative agency's changing views on how to best administer a program could become the focal point for the creation/extinguishment of federal "rights" under 42 U.S.C. § 1983. 479 U.S. at 438, 107 S.Ct. at 778.

For this reason, the lower courts have adopted the sensible view that a regulation cannot create a "right" enforceable under § 1983, unless that "right" exists in the statute that the regulation enforces. *See Mungiovi v. Chicago Housing Auth.*, 98 F.3d 982, 984 (7th Cir. 1996); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987).[5] If the statutes create no enforceable right, then HUD regulations that implement the statutes do not create an enforceable right.

---

[5] The Petition's citation, p. 15, to *Wei v. Robinson*, 246 F.2d 739, 743 (7th Cir. 1957) *cert. den.* 355 U.S. 879, 78 S.Ct. 144, 2 L.Ed.2d 109 (1957) is puzzling. There, in a deportation case, the court of appeals stated only that publication of rules in the Federal Register is *prima facie* evidence of the text. 26 F.2d at 743.

HUD's authority to promulgate 24 C.F.R. §§ 966.4 and 966.6 arises from 42 U.S.C. §§ 1437c(a) and 1437d(l). Section 1437c(a) simply authorizes HUD to enter into annual contribution contracts to fund public housing and prescribe regulations for the sound management of such project. Section 1437c(a) did not create a right actionable under § 1983. *Perry v. Housing Authority of the City of Charleston*, 664 F.2d 1210, 1213 (4th Cir. 1981); *Thompson v. Binghamton Housing Authority*, 546 F.Supp. 1158, 1178 (N.D.N.Y. 1982). Section 1437d(l) requires a housing authority to utilize leases which do not contain unreasonable terms and which require it to maintain the project in a decent, safe and sanitary condition. However, § 1437d(l) does not provide a federal cause of action for failure to maintain the premises. *Edwards v. District of Columbia*, 628 F.Supp. 333, 342 (D.D.C. 1985) *aff'd* 821 F.2d 651, 665 n. 2 (D.C.Cir. 1987); *Father Panik Village v. Pierce*, 685 F.Supp. 316, 322 (D.Conn. 1988). *See also, Hale v. Chicago Housing Authority*, 642 F.Supp. 1107, 1109 (N.D.Ill. 1986).

C. Social Guests at Public Housing Premises are not Within the Class of Persons Protected by Alleged "Rights"

The Gracias do not claim that the Fair Housing Act, 42 U.S.C. § 1437, *et seq.* gives social guests of tenants any particular rights to public housing. Rather, their Petition, p. 16, claims that § 966.4(d) extends the tenant's right to use and occupy the premises to invited guests.

Even if the Fair Housing Act could provide a private cause of action, the first question is whether plaintiff is a member of a class for whose benefit the statute was

passed. *Cort*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088. There is nothing in the Fair Housing Act to suggest Congress intended to provide safe housing for the benefit of the tenant's social guests. Standing to assert statutory violations under § 1983 has been limited to tenants directly affected by the statutes. *See, e.g., Thompson*, 546 F.Supp. at 1158 (claimants had no standing to complain of failures to comply with modernization program under 42 U.S.C. § 1437, when their apartments were not in the modernization program).

Even on its face, § 966.4(d)[6] does not give the Gracias any right to use or enjoy the property. The regulation only addresses what provisions the lease must contain; it does not provide rights to guests. Moreover, the regulation only addresses the *tenant's* use as including reasonable accommodation as guests and family members, i.e., temporary lodging. It does not give the guest the *right* to take up residency; rather, it provides the tenants with rights against being evicted if he entertains guests or accommodates relatives.

---

[6] 24 C.F.R. § 966.4(d) provides:

"(d) *Tenant's right to use and occupy.* The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased premises which shall include reasonable accommodation of the tenant's guests or visitors and, with the consent of the PHA, may include care of foster children and live-in care of a member of the tenant's family."

D. Petitioners Failed to Prove a Violation of Regulations

Section 966.4(e)[7] states only that the housing authority shall put certain clauses in its lease. It is uncontroverted that BHA's lease had these clauses. The congressional purpose was to require housing authorities to have certain clauses in their lease, not create a federal cause of action; the remedy for breaching any repair covenants was to sue in state court under state law. *Edwards*, 821 F.2d at 65; *Father Panik Village*, 685 F.Supp. at 322.

The Petition's reference to 24 C.F.R. § 966.6(c) is another "red herring." Section 966.6(c) forbids the housing authority from including lease clauses that waive the tenant's right to hold the landlord liable for negligence or intentional wrongdoing. BHA's lease contains no such clauses; it never argued any part of the lease waived any right the Gracias might have.

---

[7] In pertinent part, § 966.4(e) provides:

"(e) The *PHA's obligations*: the lease shall set forth the PHA's [public housing authority] obligations under the lease which shall include the following:

"(1) To maintain the premises and the project in a decent, safe and sanitary condition;

"(2) To comply with the requirements of applicable building codes, housing codes, and HUD regulations materially affecting health and safety;

"(3) To make necessary repairs to the premises;

"(4) To keep project buildings, facilities, and common areas . . . in a clean and safe condition; . . . "

E. Petitioners Failed to Show that Their Injury Resulted From a Custom Deliberately Tolerated by Final Policymaker for Housing Authority

The majority opinion below did not reach an alternative ground for affirming the trial court, one adopted by Justice Dennis' concurring opinion. 105 F.3d at 1059. The Gracias failed to prove that BHA policymakers were deliberately indifferent to any federally protected right.

BHA is not vicariously liable under 42 U.S.C. § 1983 for the acts of its employees. *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 63 L.Ed.2d 611 (1978). To hold BHA liable, the Gracias had to prove that a policymaker for the housing authority adopted a "custom" or "policy" with deliberate indifference to its known or obvious consequence. *Board of County Commissioners of Bryan County v. Brown*, ___ U.S. ___, 117 S.Ct. 1382, 1390 (1997); *Canton*, 489 U.S. at 388, 109 S.Ct. at 1204. A single isolated violation will not establish a custom; negligently administering a program is likewise insufficient. *Canton*, 489 U.S. at 390-91, 109 S.Ct. at 1206. Deliberate indifference is more than gross negligence and does not turn upon the culpability standard for the underlying wrong; rather, it exists only when the corporate decision reflects a deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. *Brown*, 117 S.Ct. at 1392; *Canton*, 489 U.S. at 388, 109 S.Ct. at 1204.

Finally, the custom or policy must be known to and approved by a final policymaker. *Brown*, 117 S.Ct. at 1389.

Jett v. Dallas ISD, 7 F.3d 1241 (5th Cir. 1993) *cert. den.* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1993). The delegation of authority to make discretionary decision does not make the delegatee a final policymaker. *Louis v. Praprotnik*, 485 U.S. 112, 130, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988); *Jett*, 7 F.3d at 1246.

The Petition, p. 9, erroneously claims the Court's Charge, PA K, identified Mr. Trevino and Mr. Rubalcaba as policymakers. The Charge did not identify anyone as a policymaker. BHA's policymaking authority is vested in commissioners, not its executive director or maintenance superintendent.

The City of Brownsville formed BHA in 1938 pursuant to legislative authority given it under Article 1296(k), VATCS [repealed, now Chap. 392, Tex.Loc.Gov.Code]. PA E. BHA's powers are vested with its commissioners and only they can vote. Sections 392.036 and 392.051(b), Tex.Loc.Gov.Code.

Neither the BHA's By-Laws nor Mr. Trevino's job description give him final authority to make policy. Section 392.038, Tex.Loc.Gov.Code, provides the housing authority may employ an executive director but does not specify his duties; the authority shall determine the position's duties. Art. II, § 4, of BHA's By-Laws provides the executive director:

> " . . . shall have general supervision over the administration of the business and affairs of the authority, subject to the direction of the Authority. He shall be charged with the management of the housing projects of the Authority."

The executive director's job description (PA G) provides he shall manage and direct all functions of BHA and ensure compliance with all HUD guidelines. The job description for the maintenance superintendent (PA G) did not give Mr. Rubalcaba any policymaking authority.

Assuming *arguendo* that Mr. Trevino was a final policymaker, there is no evidence he had knowledge of a widespread custom of failing to remove dead trees or not maintaining apartments. The Gracias offered no evidence that Esequiel Gracia's housing project had fallen into a state of general disrepair. There is no evidence that maintenance workers were ignoring repairs, or allowing dead trees to become hazards. Other than failing to remove the avocado tree, the Gracias offered no evidence where maintenance was deficient at Mr. Gracia's apartment. Three months before the incident, a maintenance worker decided the tree was sturdy enough not to need removal. This is precisely the kind of isolated incident that does not amount to a "custom."

Finally, there was no evidence to show Mr. Trevino acted with deliberate indifference. The Gracias do not challenge the jury's finding that BHA had no actual knowledge the tree posed a danger. Mr. Trevino had no specialized training in tree disease; the Gracias' own expert proved that only an expert would suspect the tree was rotting. If the Gracias' own expert concedes it would take expertise and specialized tools to detect the existence and extent of the rot, the evidence falls far short of establishing deliberate disregard. *Compare, Brown*, 117 S.Ct. at 1392.

CONCLUSION

For the reasons given above and for the reasons set out in the Fifth Circuit's Opinion, the Petition should be denied.

Dated August 21, 1997.

Respectfully Submitted,

ROGER WADE HUGHES*
CRAIG H. VITTITOE
GEORGINA MARTINEZ BENAVIDES
ADAMS & GRAHAM, L.L.P.
P. O. Drawer 1429
Harlingen, TX 78551-1429
210/428-7495; FAX: 210/428-2954
*Counsel of Record

Attorneys for Respondents, Brownsville Housing Authority; the Housing Authority of the City of Brownsville; Raul Trevino, Individually and as Executive Director of the Housing Authority of the City of Brownsville; and Genovevo Rubalcaba, Individually and as Supervisor of Maintenance of the Housing Authority of the City of Brownsville

MR. ROBERT L. GUERRA
THORNTON, SUMMERS, BIECHLIN,
DUNHAM & BROWN, INC.
100 East Savannah Avenue,
Suite 500
McAllen, TX 78503
956/630-3080; FAX: 956/630-0189

Additional Counsel for Respondents, Raul Trevino, Individually and as Executive Director of the Housing Authority of the City of Brownsville, Genovevo Rubalcaba, Individually, and as Supervisor of Maintenance of the Housing Authority of the City of Brownsville